Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-456

* * *

JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS

Appellants

V.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Appellees

* * *

On Appeal From The
United States District Court For The
Southern District of Texas

* * *

REPLY BRIEF OF APPELLANTS

* * *

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April, 1975

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REPLY BRIEF OF APPELLANTS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Although Appellants do not feel compelled to reply to the legal argument and authorities contained in Appellees' Brief since virtually all the material was previously set out in Appellees' Motion to Affirm, Appellants cannot, in good conscience permit certain factual assertions of Appellees to go unchallenged.

In the brief of Appellants we said, at page 5:

> ". . . Despite assertions by Appellees of 'uncontradicted testimony' and of evidence under oath (see for example, Appellees' Motion to Affirm, pp. 3, 7, and 10) and similar statements in the opinion of the court below (A.J.S., pp. 29 and 38), the fact of the matter is that no evidence was heard by the court. Thus, there is no evidence of how the Act would be interpreted and enforced by Mark White, Secretary of State of the State of Texas, one of the Appellants, and charged by statute (Article 1.03, Texas Election Code) with the responsibility for the enforcement and uniform application of the Texas election laws. There is no evidence in the record of how any particular printer might react or how the printing industry as a whole would react to the statute. There is no evidence that the statute, if enforced, would have a "chilling" effect upon First Amendment rights; no evidence that anyone

> has refused printing that has been tendered by an unpopular cause; nor any identification of the unpopular causes who will embarrass Appellees."

Appellees, in their brief, assert at page 13, footnote 6:

> "Such statements blatantly misconstrue the record, though undoubtedly such misrepresentations were unintentional and merely reflected a breakdown in communications occasioned by a change of attorneys representing the Appellants . . . . "

With due respect to counsel for Appellees, we cannot be as charitable. The efforts of Appellees to misconstrue the record and thus, through misrepresentations, mislead the court as to the nature of the hearing in the district court are intentional.

Rule 43 of the Federal Rules of Civil Procedure provides in part:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. . ."

Certain basic facts were established by a Stipulation (Record on Appeal, Instrument No. 15, reprinted as Appendix A to this Brief), but aside from those facts, no evidence was presented and no factual issues were before the three-judge court when it entered its orders. Thus it is easy to understand why counsel for Appellant stated to the court that "We

have no problems in terms of factual disputes." Strangely, Appellees omit the balance of that statement which was:

> "The Stipulation set forth the basic issues that are involved in the cause of action." (Page 43, Transcript, February 20, 1974)

To understand the assertions of Appellees' brief, it is necessary to briefly review the development of this case in the courts.

Suit was filed originally on September 12, 1973, and at that time a hearing was set on the application for a temporary restraining order for the following Monday, September 17. Appellants filed an answer to the original complaint and, contrary to the statement on page 13 of Appellees' brief, did not admit that public disclosure of the names of printers, would result in economic reprisals but, to the contrary, urged that Appellees should be required to prove those allegations. The hearing on the motion for temporary restraining order was held on September 18 before a single judge of the United States District Court for the Southern District of Texas, John V. Singleton, Jr., although, at that time, he had requested that a three-judge court be appointed. At that hearing there was testimony from two of the plaintiffs, Marion Coleman and Charles Drake. However, Judge Singleton refused to grant the temporary restraining order.

The case was tried on its merits seventeen months later, on February 20, 1974, before the three-judge court. No witnesses testified and the

testimony of no witness was incorporated by reference or otherwise. The matter was tried by Appellees as if they felt there were no facts to be determined and it was in this context that counsel for Appellants stated, as Appellees quote her, that "We have no problems in terms of factual dispute."

It is interesting to note, that, apparently, the court felt there were not factual issues because, contrary to the mandate of Rule 52 of the Federal Rules of Civil Procedure, the court filed no finding of fact.

Parenthetically, we would add that a reading of the testimony of Appellees' two live witnesses at the September 18, 1973 hearing on the temporary restraining order, reveals that such testimony falls far short of establishing any likelihood of a chilling effect upon First Amendment rights by the enforcement of 14.10(b) of the Texas Election Code. The principal part of the testimony of Mrs. Coleman was to the effect that long before she had become a printer, she was assaulted and harassed because of political positions she took as an active Republican worker, (Pages 7-17, Transcript of September 18, 1973 hearing).

The instance of Mr. Drake was that one of his customers objected to having Drake's name printed on the front of the card and objected to paying the additional cost of having it printed on the back. True, he also testified that an ex-employee, seeing his name on the card of a candidate, construed that as indicating he supported the candidate, but the ex-employee's emotion upon seeing the name was not

one of unhappiness but rather of surprise. (Pages 22-23, Transcript of September 18, 1973, hearing.)

There was some conjectural evidence by both these witnesses as to how other persons might possibly react but surely nothing which would rise to the level of admissible evidence to prove a fact.

A further example of the failure of Appellees' to present proof to establish facts essential to their position is found at the paragraph at the bottom of page six in Appellees' Brief. Appellees' conclusion that any number of alternative methods can be easily adopted, less encroaching on some fundamental rights and equally further the state interest involved is totally without any proof, evidence or testimony to support such a conclusion.

Thus, we reiterate our statement that there was no proof and no evidence before the court to establish facts essential to Appellees' asserted cause of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elizabeth B. Levatino, First Special Assistant Attorney General of Texas, as of counsel for Appellants herein, hereby certify that true and correct copies of the above foregoing Reply Brief of Appellants have been served upon opposing counsel by placing copies in the mail, prepaid to Mr. Gerald M. Birnberg, Attorney at Law, 2020 Southwest Freeway, Suite 302, Houston, Texas 77006, Counsel for Plaintiffs-Respondents; Mr. David Crump, Attorney at Law, 7018 Timber Lane, Houston, Texas 77027, Counsel for Common Cause Amicus Curiae; Mr. Joe S. Moss, Assistant District Attorney, 301 San Jacinto, Houston, Texas 77002, counsel for Defendant-Petitioner Carol S. Vance; and Mr. Leon Hirsch, Attorney at Law, 777 Houston First Savings Building, Houston, Texas 77002, counsel for Amicus Curiae Houston Chapter of the American Civil Liberties Union.

Witness my hand this 4th day of April, 1975.

Elizabeth Levatino
ELIZABETH B. LEVATINO

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE individually, and on behalf of all persons similarly situated, Plaintiffs	*	
VS.	*	CIVIL ACTION NO. 73-H-1261
HON. JOHN HILL, Attorney General of the State of Texas, HON. MARK WHITE, Secretary of State of the State of Texas, and CAROL S. VANCE, District Attorney, Harris County, Texas, Defendants	*	

STIPULATIONS OF FACT

COME NOW the Plaintiffs and Defendants in the above styled and numbered cause by and through their counsel of record, and would agree and stipulate to each of the following facts:

1. That all Defendants have been duly served with process herein.

2. That Defendant JOHN HILL is the duly elected, qualified and acting Attorney General of the State of Texas.

3. That Defendant MARK WHITE is the duly appointed, qualified and acting Secretary of State of the State of Texas.

4. That Defendant CAROL VANCE is the duly elected, qualified and acting District Attorney for Harris County, Texas.

5. That Plaintiffs MARION COLEMAN, GRADY E. FITCH and CHARLES DRAKE are all residents of Harris County, Texas, and are all individuals all of whom are engaged in the printing industry as printers and all of whom have undertaken to print political advertising in the past and desire and intend to undertake the printing of political advertising in the future.

6. That the amount in controversy in this case well exceeds the sum of TEN THOUSAND DOLLARS ($10,000.00), exclusive of interest and costs (although money damages are not here sought).

7. That this Honorable Court has jurisdiction over this dispute by virtue of Title 28 of the United States Code, Sections 1331, 1343, 2201 and 2202 and that the convening of a Three-Judge District Court was and is appropriate by virtue of Title 28 of the United States Code, Sections 2281 and 2284.

8. That venue in the Southern District of Texas is proper under Section 1391(b) of Title 28 of the United States Code.

9. That the 63rd Legislature of the State of Texas amended Article 14.10(b) of the Texas Elec-

tion Code to provide, in pertinent part, as follows:

> "any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person who paid for the advertising".

10. That the aforesaid amendment to Article 14.10(b) of the Texas Election Code became effective on June 14, 1973.

11. That Article 14.10 as amended provides for punishment for its violation by a fine of not less than $100.00 nor more than $5,000.00 or imprisonment not less than one year nor more than five years or both such fine and imprisonment.

12. That there are no pending criminal prosecutions for alleged violations of Article 14.10(b), as amended, to the knowledge of any of the parties hereto.

13. That in furtherance of his official duties and responsibilities, Defendant CAROL VANCE will faithfully seek compliance with and enforce the provisions of Article 14.10(b) and will prosecute any printer or publisher who violates its requirements whenever such violations are brought to his attention.

14. That, in the event that this Honorable Court should determine that Article 14.10(b) is unconstitutional, then in that event, Defendants JOHN HILL, MARK WHITE and CAROL VANCE are proper

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parties for purposes of effecting declaratory relief.

15. That one of the purposes of Article 14.10 (b), as amended, is to provide a means of tracing the source of political advertising disseminated to the general public.

16. That Article 14.10(b), as amended, prohibits the dissemination of political advertising material which does not reveal the identity of the individuals contracting for and paying for the printing or publishing of the political advertisement.

17. That one of the objectives of Article 14.10 (b) as amended is to avoid the dissemination of so-called "smear sheets" in political campaigns and elections whereby certain information is disseminated to the general public and falsely attributed on the face thereof to a particular political candidate or spokesman, or whereby false and prejudicial information is distributed to the general public without reasonable means of rapidly identifying the perpetrator of the "smear".

18. The State of Texas has a legitimate interest in preventing the dissemination of "smear sheets" as defined above, or in minimizing the deleterious effects thereof.

19. That, if this Honorable Court should determine that Article 14.10(b), as amended is unconstitutional, but only in such event, then a judgment declaring Article 14.10(b) to be null and void would be appropriate in this case.

RESPECTFULLY SUBMITTED,

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